

Letter of Findings: 04-20110244
Gross Retail Tax
For the Years 2008 and 2009

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ISSUES

I. Dealer Sales – Gross Retail Tax.

Authority: IC § 6-2.5-5-1 to 70; IC § 6-2.5-2-1; IC § 6-2.5-8-8(a); IC § 6-8.1-5-1(c).

Taxpayer argues that it was not required to collect sales tax on the sale of two vehicles to another vehicle dealer.

II. Out-of-State Transactions – Gross Retail Tax.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1(a); IC § 6-2.5-4-1(a); IC § 6-2.5-4-1(b); IC § 6-8.1-5-4(a); Sales Tax Information Bulletin 28S (December 2009); Sales Tax Information Bulletin 28S (October 2007).

Taxpayer maintains that it was not required to collect sales tax on the sale of a bulldozer which Taxpayer purportedly delivered to an out-of-state customer.

III. Double Taxation – Gross Retail Tax.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-4-1(b); IC § 6-2.5-8-8(b); [45 IAC 2.2-1-1](#)(d).

Taxpayer states that requiring it to collect sales tax on the sales of vehicles would result in double taxation.

STATEMENT OF FACTS

Taxpayer is an individual who conducts an Indiana excavating business as a sole proprietorship. In addition, taxpayer earns money from selling equipment such as "skids," Bobcat buckets, bulldozers, trailers, and other vehicles.

The Department of Revenue (Department) conducted an audit of Taxpayer's records. According to the audit report, the majority of Taxpayer's income stemmed from equipment sales and not from the excavating operation. The audit reviewed Taxpayer's sales tax records and exemption certificates. If the Taxpayer failed to obtain an exemption certificate for a particular sale, the audit assessed sales tax. According to the audit report, "[Taxpayer] was not aware of the requirement to collect sales tax on vehicles because he is not registered as a dealer."

Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted by telephone during which Taxpayer's representatives explained the basis for the protest. This Letter of Findings results.

I. Dealer Sales – Gross Retail Tax.

DISCUSSION

Taxpayer sold equipment and vehicles for which the Department assessed sales/use tax because Tax was not collected at the time the transaction occurred. Taxpayer objects on the ground that two of the transactions were for the sale of a vehicle or item of equipment to another dealer.

Indiana imposes a gross retail (sales) tax on retail transactions in Indiana. IC § 6-2.5-2-1. The legislature has provided a number of exemptions to the imposition of that tax. See IC § 6-2.5-5-1 to 70. One of those exemptions is provided at IC § 6-2.5-5-8 which states that, "Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of his business without changing the form of the property."

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

During the course of the administrative review, Taxpayer supplied a copy of a "Resale Certificate of Exemption" received from the Indiana truck dealership.

Under IC § 6-2.5-8-8(a), "A person... who makes a purchase in a transaction which is exempt from the state gross retail tax and use taxes, may issue an exemption certificate to the seller instead of paying the tax." Once the purchaser provides the exemption certificate, the retail merchant is under no obligation to collect sales tax on the transaction. IC § 6-2.5-8-8(a) states that, "A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase."

Taxpayer has met its burden of demonstrating that it was not required to collect sales tax on the two transactions which occurred with the Indiana truck dealership.

FINDING

Taxpayer's protest is sustained.

II. Out-of-State Transactions – Gross Retail Tax.

DISCUSSION

Taxpayer objects to the assessment of sales/use tax on the sale of a bulldozer to a buyer located in Kentucky.

IC § 6-2.5-2-1(a) imposes a sales tax on retail transactions made in Indiana. IC § 6-2.5-1-2 defines a retail transaction as "a transaction of a retail merchant that constitutes selling at retail as described in IC § 6-2.5-4-1... or that is described in any other section of IC § 6-2.5-4." IC § 6-2.5-4-1(a) provides that "[a] person is a retail merchant making a retail transaction when he engages in selling at retail." IC § 6-2.5-4-1(b) further explains that a person sells at retail when he "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration."

The issue of vehicle sales to out-of-state customers is addressed in Sales Tax Information Bulletin 28S (October 2007) (20071031 Ind. Reg. 045070718 NRA) in effect at the time Taxpayer's transaction occurred. The bulletin states in part as follows:

A vehicle or trailer sold in interstate commerce is not subject to the Indiana sales tax. To qualify as being "sold in interstate commerce" the vehicle or trailer must be physically delivered, by the selling dealer, to a delivery point outside Indiana. The delivery may be made by the dealer or the dealer may hire a third party carrier. Terms and method of delivery must be indicated on the sales invoice. **The dealer must document terms of delivery and must keep a copy of such terms of delivery to substantiate the interstate sale.** The exemption does not apply to sales to out-of-state buyers in which the buyer takes physical possession of a vehicle or trailer in Indiana, nor is the exemption valid if the buyer, and not the seller, hires a third party carrier to transport the vehicle or trailer outside Indiana. If the buyer hires the carrier, the carrier is acting as an agent for the buyer, and thus the buyer takes physical possession within Indiana. Possession taken within the state does not qualify as an interstate sale. **(Emphasis added)** See also Sales Tax Information Bulletin 28S (December 2009) (20100127 Ind. Reg. 045100029 NRA) ("Terms and the method of delivery must be indicated on the sales invoice. The dealer must document terms of delivery and must keep a copy of such terms of delivery to substantiate the interstate sale.")

The Department is unable to agree that Taxpayer has met its burden of demonstrating that the April 2009 sale meets the requirements set out in Sales Tax Information Bulletin 28S (October 2007). Taxpayer's invoice states that the bulldozer was "sold and delivered in Kentucky" but does nothing to document the "terms and method of delivery...."

Under IC § 6-8.1-5-4(a), taxpayers are required to keep adequate books and records necessary to determine a taxpayer's tax liability:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and cancelled checks.

Taxpayer has failed to fully document or substantiate that it delivered the bulldozer was to Kentucky. The Department requires that in order to obtain the exemption, "Terms and method of delivery must be indicated on the sales invoice. The dealer must document terms of delivery and must keep a copy of such terms of delivery to substantiate the interstate sale." Sales Tax Information Bulletin 28S (October 2007).

FINDING

Taxpayer's protest is respectfully denied.

III. Double Taxation – Gross Retail Tax.

DISCUSSION

The Department found that Taxpayer had failed to collect sales tax when it sold vehicles to his customers. Taxpayer argues that he was not required to collect sales tax when he sold the vehicles because he paid sales tax when he first acquired them. Taxpayer argues that requiring him to collect sales tax from his customers would result in "double taxation."

It should be noted that Taxpayer did not qualify as a dealer and – as Taxpayer explains – "he contacted the Bureau of Motor Vehicles on how to handle the transactions and was informed that in order to sell a vehicle he would have to pay the sales tax in order to obtain the title so he can legally sell it...." Taxpayer goes on to explain that when his customers register the vehicles at the BMV, they pay sales tax at that time.

As noted previously, Indiana imposes a gross retail tax on retail transactions in Indiana. IC § 6-2.5-2-1. Although Indiana law permits a number of exemptions, there is no specific exemption for transactions in which the vendor contemplates that the customer will consistently self-report use tax on the transactions. [45 IAC 2.2-1-1\(d\)](#) provides that vendors engaged in "casual sales" are not required to collect sales tax on the receipts from those sales, but the provision specifically excludes motor vehicles.

The Indiana gross retail tax is not imposed on gross receipts from casual sales except for gross receipts from casual sales of motor vehicles and sales of rental property. A casual sale is an isolated or occasional sale by the owner of tangible personal property purchased or otherwise acquired for his use or consumption, where he is not regularly engaged in the business of making such sales. (Emphasis added).

Although Taxpayer purportedly does not sell a sufficient number of vehicles to qualify as a "dealer," Taxpayer

is a registered retail merchant for sales tax purposes and should have been collecting tax on these transactions. However, IC § 6-2.5-5-8(b) provides as follows:

Transactions involving tangible personal property other than a new motor vehicle are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of the person's business without changing the form of the property.

Because Taxpayer is not in the business of selling "new motor vehicles," Taxpayer is entitled to acquire its equipment without paying sales tax at the time it purchases that equipment and should – in all future purchases – present the buyer with Form ST-105.

Under IC § 6-2.5-4-1(b) Taxpayer is a "retail merchant" because he is "engaged in selling at retail" and because he "acquires tangible personal property for the purpose of resale." Under IC § 6-2.5-2-1, Taxpayer acts as an "agent for the state" and is required to collect that tax. Taxpayer should have collected sales tax at the time he sold the equipment and is now responsible for that tax.

As an accommodation to Taxpayer, the audit division is requested to review and provide a "credit" for whatever information is able to provide – within 30 days of the date on which this Letter of Findings is issued – which substantiates his assertion that he paid sales tax at the time he purchased equipment for the purpose of resale.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer's protest is sustained in part and denied in part: Taxpayer has provided a "Resale Certificate of Exemption" received from the Indiana truck dealership; Taxpayer has not provided sufficient information to establish that it delivered the vehicle to an out-of-state customer; as a retail merchant, Taxpayer was required to collect sales tax when it sold equipment to its customers.

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